Supreme Court, U.S.
FILED

NO. 01 315 AUG 2 1 2001

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IN THE
SUPREME COURT OF THE UNITED STATES

ANGELA MCAFEE, individually, and ANGELA MCAFEE, as next friend of, as natural guardian of, and as guardian of the property of DAVID RUSSELL MCAFEE, JR., BRANDON CHARLES MCAFEE, and MICHAEL CHASE MCAFEE, minors,

Petitioners

vs.

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Counsel for Petitioners:

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28 pp

QUESTIONS PRESENTED

(1) This case presents an issue of first impression. Pursuant to the decision of this Court in Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 143 L.Ed.2d 448, 119 S.Ct. 1322 (1999) is the Defendant's removal of a case from a State Court to the United States District Court premature if such removal is made before service of process takes place when no waiver of service has been made by the Defendant?

LIST OF PARTIES INCLUDING PARENT AND SUBSIDIARY CORPORATIONS

Counsel of record for Petitioners certifies that the following listed parties, including parent and subsidiary corporations have an interest in the outcome of this case.

Parties: Angela McAfee

David Russell McAfee, Jr., by his natural guardian, Angela McAfee

Brandon Charles McAfee, by his natural guardian, Angela McAfee

Michael Chase McAfee, by his natural guardian, Angela McAfee

Transamerica Occidental Life Insurance Company

Transamerica Corporation

Aegon N.V. (Parent Company)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported. A copy of same is attached hereto as Appendix A. The Court of Appeals' denial of Petitioners' Petition for Rehearing En Banc is not reported and is attached hereto as Appendix B. The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, is reported at 2000 U.S. Dist. Lexis 19615 (N.D.Ga. 2000), however, that opinion fails to deal with the issue presented by this Petition for Certiorari. A copy of the Order of the District Court ruling on the issue presented is attached hereto as Appendix C. A copy of the Order of the District Court denying Plaintiffs' Motion for Reconsideration of the issue presented is attached hereto as Appendix D.

JURISDICTION

Petitioners' Petition for Rehearing En Banc respecting the decision of the Court of Appeals dated March 27, 2001 was denied by the Court of Appeals on July 20, 2001. This Petition for Writ of Certiorari was filed within ninety (90) days of the denial of the Petition for Rehearing En Banc. Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C.§ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1446(b):

"The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, by service or otherwise, of a copy of the initial pleading setting forth the claim for

relief upon which such action or proceeding is based."

STATEMENT OF THE CASE

Petitioners filed their original Complaint in this action in the State Court of Cobb County, Georgia on July 1, 1999. Respondent removed the case to the United States District Court for the Northern District of Georgia, Atlanta Division on July 30, 1999. Service was perfected on Defendant on August 30, 1999 and Petitioners filed their Motion to Remand which was denied by Order dated October 12, 1999. Petitioners filed a Motion for Reconsideration of the Motion to Remand which was denied by Order dated November 16, 1999. Petitioners and Respondent each filed Cross-Motions for Summary Judgment on the merits of Petitioners' claim and Briefs in support and in opposition. On July 28, 2000 the Trial Court issued its Order denying Petitioners' Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment. Petitioners filed their Notice of Appeal on August 8, 2000 and that appeal was briefed and orally argued before the United States Circuit Court of Appeals for the Eleventh Circuit. The Eleventh Circuit issued its opinion on March 27, 2001 affirming the decision of the Court below. Petitioners filed a Petition for Rehearing En Banc, which was denied by the Eleventh Circuit by Order dated July 20, 2001.

STATEMENT OF FACTS

Petitioner, Angela McAfee, is the widow of David Russell McAfee. The marriage of Angela McAfee and David McAfee produced three minor children, David Russell McAfee, Jr., age 16, Brandon Charles McAfee, age 14, and Michael Chase McAfee, age 9. David McAfee was an employee of Lockheed-Martin Corporation, working at the plant in Marietta, Georgia for a period of approximately 19 years and had been a normal Georgia citizen prior to May 11, 1998. On May 11, 1998 at approximately 7:00 p.m. David McAfee drove to a BP Station/Convenience Store on Highway 41 in Marietta, Georgia. Mr. McAfee stated to the attendant, Roy Wade, that he wanted some beer and that "I'll pay you for it." Mr. Wade saw that McAfee had a gun, became frightened, went inside, locked the door behind him, and advised Mr. Wade's wife, Pattie Wade, to go to the back room. Mr. Wade than called police. Pattie Wade saw David McAfee holding a "long-barrel gun." After a few minutes, when Mr. Wade did not emerge from the store with beer, Mr. McAfee left the premises.

Police officers from both the Cobb County Police Department and the City of Marietta Police Department arrived on the scene and were told by Mr. Wade that the man had left. Mr. Wade pointed the officers in the direction that Mr. McAfee had taken. The Police located David McAfee in his van in the parking lot of the Crab House Restaurant on Highway 41 in Cobb County. Several officers arrived and surrounded the van. The officers ordered Mr. McAfee to put down any gun he was holding and to come out of the vehicle with his hands up. Mr. McAfee exited the vehicle in an apparent attempt to flee on foot, holding a long barreled gun, but returned to his car when confronted by Officer Robert M. Hansen. Shortly thereafter, Mr. McAfee opened the sliding

door of his van, pointed his long barreled gun up in the air, and fired one round. At that time four officers fired their weapons, firing twenty-three rounds into the van. Mr. McAfee was taken to Kennestone Hospital where he was pronounced dead.

An autopsy was performed by Dr. Brian Frist of the Cobb County Medical Examiner's Office. That autopsy reveals that Mr. McAfee died as a result of sixteen gunshot wounds. It is undisputed that none of the gunshot wounds was self-inflicted. All of the gunshot wounds were received as a result of bullets fired by officers of the Cobb County Police Department and Marietta Police Department. An analysis of David McAfee's blood was done by the Georgia Crime Laboratory which revealed that Mr. McAfee was intoxicated having had a blood alcohol level of .18% at the time of his death.

David McAfee was an insured through his employer, Lockheed Martin Corporation, under a policy of insurance issued by Respondent Transamerica Occidental Life Insurance Company, which policy provided benefits for accidental death having a policy limit of One Million Dollars ($1,000,000.00). Dependant coverage for his wife Angela and his children had been purchased as well. Angela McAfee notified Transamerica of the death of her husband, and made claim for the proceeds of the policy. By letter dated October 15, 1998 Transamerica advised Mrs. McAfee that it was denying this claim. Mrs. McAfee requested an appeal of the denial of the claim for the insurance benefits. By letter dated April 26, 1999 Respondent Transamerica reaffirmed its earlier decision not to pay benefits. Mrs. McAfee then initiated this civil ERISA action in an effort to recover the benefits due her and her children for the death of her husband.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Eleventh Circuit completely ignores the requirements imposed by the United States Supreme Court in Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 143 L.Ed.2d 448, 119 S.Ct. 1322 (1999) in that the decision violates the plain instructions of the Supreme Court and the plain language of 28 U.S.C. § 1446(b) as interpreted by the Supreme Court and allowed a Defendant to remove Plaintiffs' case from the State Court in which it was filed to a United States District Court before service was perfected upon the Defendant and without the Defendant having waived service as a defense, effectively enlarging the amount of time for the Defendant to make such removal beyond the time limits stated in the statute.

On July 1, 1999 Petitioners filed the above-captioned Civil Action in the State Court of Cobb County seeking to recover benefits under the subject policy. Counsel for Petitioners transmitted to Respondent a courtesy copy of Plaintiff's Complaint by certified mail. However, no service was perfected on Respondent at that time because Respondent had moved its registered agent to a new location without notifying the Secretary of State of Georgia of the change of address. On July 30, 1999 Respondent filed its "Notice Of Removal To The United States District Court" with the State Court of Cobb County and the District Court. The case was then transferred to the District Court for further handling. Service was perfected on Respondent on August 30, 1999.

Petitioners filed their Motion to Remand, asking that the District Court remand the matter to the State Court of

Cobb County. By Order entered October 12, 1999 (Appendix C) the District Court denied Petitioners' Motion. Petitioners then filed a Motion for Reconsideration which was denied by the District Court (Appendix D).

It is apparent from a review of the pleadings filed in this case, most notably the Notice Of Removal To The United States District Court, what has occurred in this matter. The Respondent has removed this matter to the District Court prematurely. The removal statute, 28 U.S.C. § 1446(b), specifies that Notice Of Removal of a Civil Action shall be filed "within thirty days after the receipt by the defendant through service or otherwise of a copy of the initial pleadings setting forth the claim for relief upon which such action or proceeding is based..." (Emphasis added).

The issue of when the removal statute is triggered has been addressed by this Court recently. In Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 143 L.Ed. 2d 448, 119 S.Ct. 1322 (1999) the Court decided as follows:

> "The question presented is whether the named defendant must be officially summoned to appear in the action before the time to remove begins to run. Or, may the 30 - day period start earlier, on the named defendant's receipt, before service of the official process, of a `courtesy copy' of the filed complaint faxed by counsel for the Plaintiff?
>
> We read Congress' provisions for removal in light of a bedrock principle: an individual or entity named as a defendant is not obliged to engage in litigation unless

> notified of the action, and brought under a Court's authority, by formal process. Accordingly, we hold that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, `through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service." Murphy Brothers, 143 L.Ed. 2d at 455 (1999).

Respondent Transamerica removed this matter to this Court prematurely as such removal did not come within the thirty (30) day period after service, as is required by the statute and Murphy Brothers. Respondent argues several inconsistent theories as justification.

First, Respondent filed an "Amended Notice Of Removal." When a Notice of Removal is filed, it is filed in the court in which the target case is pending. When the clerk of that court (in this case State Court of Cobb County) receives such a Notice of Removal, the clerk of that Court transfers responsibility for the case to the United States District Court. That is what removal is all about - transferring the case from the State Court to the Federal Court. Thus, after a case has been removed to the Federal Court, as had already occurred in the case at bar, it would be a useless act to "remove it again" as was attempted by Respondent.

The real question presented is whether or not the case was properly removed by Transamerica in the first place. Petitioners respectfully submit that, for the reasons pointed out previously, Transamerica filed its Notice Of Removal out

of time. Thus, the removal itself (not the Notice of Removal document) is defective.

The Orders denying Petitioners' Motion to Remand and Motion for Reconsideration ignore both the Murphy Brothers decision of the Supreme Court and the plain language of the removal statute, as that statute now has been interpreted by the Supreme Court which now, according to Murphy Brothers, says:

> "The notice of removal of a civil action or proceeding shall be filed *within thirty days after the receipt by the defendant*, [by service of process], of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b). (Emphasis supplied).

The key element of this aspect of the issue is interpretation of the words "within thirty days after receipt by the defendant." If those words mean that the time for filing the notice of removal begins upon obtaining a copy by mail, than the defendant has thirty (30) days from receipt by mail to file the notice of removal. Alternatively, if those words mean that there has to be service before the thirty (30) day period begins, defendant would have a window beginning August 30, 1999 (actual date of service) and ending September 30, 1999 to file a removal petition. This Court has decided this issue in such a manner as to create a thirty (30) day window for removal beginning with formal service. Specifically, this Court found that the service of the Summons and Complaint triggers the beginning of the thirty (30) day removal period. Murphy Brothers, 143 L.Ed. 2d at 457-460.

Respondent argued below that, because it had not raised service as a defense in its answer, the above would not apply to it in this case. However, Respondent ignores the following statement from the Murphy Brothers opinion:

> "Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forego procedural or substantive rights." Murphy Brothers, 143 L.Ed. 2d at 457.

While it is true that the Respondent in this case did not raise service as an affirmative defense in its answer, the Respondent took no action to affirmatively waive lack of service as a defense which would preclude it from raising lack of service as a defense in a later motion or other pleading. (See Answer of Defendant). In the Notice of Removal itself, Respondent Transamerica states as follows:

> "2.
>
> Transamerica has not been served with a summons and complaint, although Transamerica received a copy of the complaint by mail from plaintiff's attorney on July 7, 1999." (See ¶ 2, Notice of Removal to the United States District Court). (Doc.1-Pg.1).

It is clear that Respondent has not "waived" service, and had certainly not done so at the time of filing the Notice Of Removal, based upon the above quotation. Given that the Respondent filed the removal petition before the window for filing same had appeared, Respondent did not properly

remove this case to the District Court, and the case should have been remanded.

Prior to the decision of this Court in Murphy Brothers there was a split among the various Circuits about whether the removal period began running with "receipt" of the Summons and Complaint or actual "service" of the Summons and Complaint. In fact, the Murphy Brothers case came from the Eleventh Circuit which had previously held that the time for removal began running with the receipt of the Summons and Complaint, rather than with actual service. See Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 125 F. 3d 1396 (11th Cir. 1997). This Court answered the "receipt versus service" question by reversing the Eleventh Circuit and stating that the time for removal began running with service, not receipt. The Orders denying Plaintiff's Motion for Remand and Motion for Reconsideration interpret the code section at issue in a manner inconsistent with the interpretation of this Court in Murphy Brothers. 28 U.S.C. § 1446(b), as interpreted by this Court in Murphy Brothers, establishes the time frame during which removal must occur.

It is axiomatic that statutes are to be strictly construed. The District Court fails to follow this mandate, by completely ignoring the language of 28 U.S.C. § 1446(b) which requires that the Notice of Removal "shall be filed within thirty days after receipt by the Defendant... of a copy of the initial pleading...." (Emphasis supplied). The United State Supreme Court has interpreted "receipt" to mean receipt by service of process. Thus, the removal must take place after service of process.

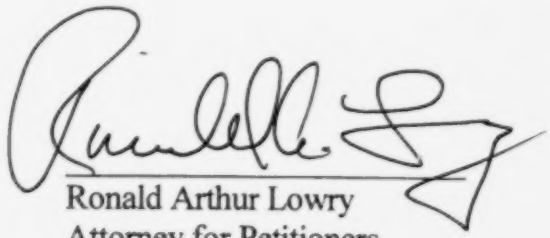
The statute gives the Defendant thirty (30) days to file a Notice of Removal. The Order of the District Court (affirmed without comment by the Panel Decision)

effectively gives the Defendant more than thirty (30) days to file a Notice of Removal, a direct contradiction to the plain language of § 1446(b). This defect is highlighted when one examines the actions of Respondent in this very case. Respondent filed its initial Notice of Removal on July 30, 1999 and its Amended Notice of Removal in the State Court of Cobb County on September 17, 1999 forty-eight (48) days apart.

Petitioners have attached a copy of the panel decision of the Eleventh Circuit in the instant case to this Petition for the convenience of this Court. No reference appears anywhere in the panel decision to the removal issue. In order for lawyers to properly do their jobs they must rely on legal research which yields the case law which tells them what to do. Petitioners relied upon the decision of the United States Supreme Court in Murphy Brothers in the instant litigation. The unpublished Order of the trial court denying the Motion to Remand and the unpublished Order of the trial court denying Petitioners' Motion for Reconsideration appear to be in direct conflict with the opinion issued by this Court in Murphy Brothers. The lawyers and trial judges of the Eleventh Circuit (indeed of the entire nation) need guidance from this Court as to the proper interpretation of Murphy Brothers. Petitioners respectfully request that this Court grant Petitioners' Petition for Certiorari and issue an opinion which can be used by the trial courts and the members of the bar as guidance.

CONCLUSION

Angela McAfee, individually and on behalf of her three children, David, Brandon and Michael, respectfully requests that this Court grant the Writ of Certiorari and that this Court reverse the decision of the United States Court of Appeals for the Eleventh Circuit and remand the matter to the State Court of Cobb County.



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APPENDICES

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14320

D.C. Docket No. 99-01975-CV-CAP-1

ANGELA MCAFEE, individually and as next friend of, as natural guardian of, and as guardian of the property of DAVID RUSSELL MCAFEE, JR., BRANDON CHARLES MCAFEE, AND MICHAEL CHASE MCAFEE, minors,

Plaintiff-
Appellant,

versus

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Defendant-
Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

(March 27, 2001)

Before BARKETT, HILL and KRAVITCH, Circuit Judges.

PER CURIAM:

Appellant, Angela McAfee, wife of the decedent-insured, David Russell McAfee, appeals the district court order denying her Employment Retirement Income Security Act claim against Appellee, Transamerica

Insurance Company, alleging that Transamerica wrongfully denied her claim for death benefits under her husband's accidental death insurance policy on the grounds that his death in a police shooting could not be deemed an "accident" pursuant to the policy under the circumstances presented. We find no reversible error in this determination.

AFFIRMED

APPENDIX "B"
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14320-II

ANGELA MCAFEE, individually and as next friend of, as natural guardian of, and as guardian of the property of DAVID RUSSELL MCAFEE, JR., BRANDON CHARLES MCAFEE, AND MICHAEL CHASE MCAFEE, minors,

Plaintiffs-
Appellant,

versus

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Defendants-
Appellee.

On Appeal from the United States District Court or the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: BARKETT, HILL and KRAVTICH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

APPENDIX "C"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:99-CV-01975-RLV

ANGELA MCAFEE,

Plaintiff,

v.

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Defendant.

ORDER

The plaintiff initiated the instant action against Transamerica Occidental Life Insurance Company [hereinafter "Transamerica"] in the State Court of Cobb County, Georgia, on July 1, 1999. On July 30, 1999, Transamerica filed a Notice of Removal in this court on the grounds that federal question jurisdiction exists and, alternatively, that there is diversity jurisdiction. This matter is currently before the court on the plaintiff's motion to remand to the State Court of Cobb County. For the reasons set forth below, the court hereby **DENIES** the plaintiff's motion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The plaintiff brought this action against Transamerica to recover accidental death benefits for the

death of her husband, David McAfee. David McAfee was insured under a group policy issued by Transamerica to his employer, Lockheed Martin Corporation, for basic accidental death benefits of $50,000 and optional accidental death benefits of $950,000. The policy specifically excluded from coverage any loss "caused or resulting from" the following conditions:

> A. Intentionally self-inflicted injuries;
> B. Suicide or any attempted suicide, while sane or insane; ...
> C. Illness, disease, bodily or mental infirmity or any related treatment (bacterial infection resulting from an accidental bodily injury or accidental ingestion or a poisonous substance shall not be excluded); ...

On or about May 11, 1998, David McAfee was shot and killed in an exchange of gunfire with police officers. The plaintiff filed a claim with Transamerica to recover accidental death benefits under the policy, contending that her husband's death was an accidental death under the policy. In reviewing the plaintiff's claim, Transamerica concluded that Mr. McAfee's death resulted from his intentional acts, rather than from accidental bodily injury, and was therefore excluded from coverage. Transamerica's decision was communicated to the plaintiff by letter dated October 15, 1998, which advised the plaintiff of her right to request an administrative review of the claims decision and to submit additional information in support of her claim within sixty days.

On December 18, 1998, the plaintiff requested an administrative appeal. The plaintiff submitted additional information for Transamerica's consideration, including a videotape of the shootout resulting in Mr. McAfee's death, the medical examiner's report, and an investigator's report.

After reviewing this additional information, Transamerica confirmed its decision to deny the claim for benefits.

On July 1, 1999, the plaintiff commenced this action in the State Court of Cobb County, Georgia, seeking recovery of benefits under the policy plus a penalty and attorney fees. Transamerica received a copy of the complaint by mail from the plaintiff's attorney on July 7, 1999, but no formal service was effected at that time. On July 30, 1999, Transamerica filed a Notice of Removal in this court. On August 30, 1999, the plaintiff filed a motion to remand to sate court, asserting that the notice of removal was defective because it was issued prior to service and, therefore, not within the thirty day time period set forth in 28 U.S.C. § 1446.

Transamerica was formally served on August 30, 1999. Eighteen days later, on September 17, 1999, Transamerica filed an Amended Notice of Removal in this court. The plaintiff maintains that the case should be remanded to the State Court of Cobb County, Georgia, because, according to the plaintiff, the original notice of removal was defective as premature and cannot be remedied by the defendant's filing of an amended notice of removal within thirty days of formal service.

II. LEGAL DISCUSSION

A defendant electing to remove a case from state to federal court must follow certain procedural requirements as set out in 28 U.S.C. § 1446. Those requirements include filing a notice of removal within thirty days after the defendant receives a copy of the plaintiff's initial pleading. Section 1446, therefore, limits the period in which a defendant may exercise his right of removal. As section 1446(b) states in part:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

A defect in removal procedure, such as an untimely notice of removal, will support a district court's remand of a removed case to state court. 28 U.S.C. § 1447(c). Further, under section 1447 (c), a district court must remand an action to state court if it finds that federal subject matter jurisdiction is lacking.

Prior to 1999, there was a question among federal courts as to when the thirty day period for filing a notice of removal commenced. Some courts had held that it did not begin to run until the defendant received notice of the complaint through formal service of process. Other courts, including the Eleventh Circuit, had held that the thirty day period began to run once the defendant received *any* copy of the complaint from the plaintiff, including a faxed, filed-stamped copy or "courtesy" copy. See, e.g., Michetti Pipe Stringing, Inc. v. Murphy Brothers, Inc., 125 F.3d 1396 (11th Cir. 1997), *reversed*, ___U.S. ___, 119 S. Ct. 1322 (1999). The United States Supreme Court answered this question in Murphy Brothers by holding that only formal service of the complaint, or a summons where service of the complaint is not required, will trigger the running of the

thirty day period, not a defendant's receipt of a courtesy copy of the complaint in the absence of formal service.[1]

In the present case, the plaintiff has asked this court to remand her case to state court on the basis that the defendant's removal of the case to federal court was incurably defective. First, this court notes that after a careful review of the law in this area, including an examination of the cases which the plaintiff has cited, it does not find any support for the contention that a notice of removal filed prior to the running of the thirty day period is procedurally defective.[2] Further, even if this court were to hold that the defendant's first notice of removal was defective, the amended notice of removal, which the defendant filed within thirty days after receipt of formal service, would have effectively cured that defect. Finally, the court notes that policy considerations would not support a remand in this case, as there is no harm to the plaintiff occasioned by a premature notice of removal.[3] The court holds that the notice of removal was timely and proper.

III. CONCLUSION

For the foregoing reasons, the court hereby **DENIES** the plaintiff's motion to remand.

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[1] Murphy Brothers simply established the beginning point for the thrity day period, beyond which removal was not permitted; it did not hold, as suggested by the plaintiff, that removal could not be effected prior to the beginning of that thirty day period.

[2] On the other hand, as the defendant pointed out, there is at least one federal court which has expressly held that the "premature" removal of a case, which is otherwise properly removable to federal court, does not warrant a remand to state court. See Media Corp. v. Digiovanna, 1994 WL 268250 (E.D. Penn., June 14, 1994). The court disagrees with the plaintiff's contention that this case was overruled by Murphy Brothers.

[3] The plaintiff has not argued in her motion for remand that this court lacks subject matter jurisdiction to entertain the case.

SO ORDERED, this 8th day of October, 1999.

/s/
Robert L. Vining, Jr.
Senior United States District Judge

APPENDIX "D"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:99-CV-1975-JEC

ANGELA MCAFEE,

Plaintiff(s),

v.

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Defendant(s).

ORDER

The above entitled action is presently before the Court on Plaintiff's Motion For Reconsideration [13]. No response has been filed, pursuant to Local Rule 7.1B.

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration [13] is **DENIED**.

SO ORDERED, this 16 day of NOVEMBER, 1999.

/s/
Julie E. Carnes
United States District Judge